MALAYSIAN REPORTS

YONG WEE MING v. CHIN THIAN GUAN

[F.C. (Abdul Hamid, Seah & Hashim Yeop A. Sani F.JJ.) July 4 & August 15, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 317 of 1982]

Land Law – Indefeasibility of title – Indefeasibility cannot be defeated by setting up fiction of trust – Allegation of trust supported by letter of registered proprietor – Caveat allowed to continue till trial of action.

In this case the respondent, the registered owner of a piece of land, executed a transfer of the land in favour of one Tan Tock Sing and the transfer was duly registered. Subsequently Tan Tock Sing subdivided the land into eight shop lots and charged the land to Tong Bee Finance (Malaysia) Berhad to secure a loan. Later he entered into a sale and purchase agreement to sell the land to the appellant. Before the registration of the memorandum of discharge of charge and the memorandum of transfer the respondent lodged a caveat against the land claiming that he was the owner of the land which was held in trust for him by Tan Tock Sing. The appellant applied to have the caveat removed but this application was dismissed. He appealed.

Held: (1) the principle of indefeasibility of title conferred by registration under the Torrens System cannot be defeated by setting up the fiction of a trust or by applying the principles of what has been called constructive or equitable notice;

(2) in this case quite apart from his assertion of ownership the respondent had produced a letter allegedly written by the registered proprietor declaring the alleged trust;

(3) the claim of the respondent against the registered proprietor was not baseless, frivolous or vexatious and the affidavit evidence disclosed that there was a serious question to be tried. The learned Judge was therefore justified in ordering the respondent to file a suit against the registered proprietor and on balance of convenience that in order to maintain the *status quo* the caveat should remain until the trial of the action.

Cases referred to:

(1) *Abigail* v. *Lapin* [1934] A.C. 491, 500
(2) *Assets Co. Ltd.* v. *Mere Roihi* [1905] A.C. 176, 204
(3) *Eng Mee Yong & Ors.* v. *Letchumanan* [1979] 2 M.L.J. 212

FEDERAL COURT.

F.S. Chong for the appellant.
H. Ball for the respondent.

Cur. Adv. Vult.

Seah F.J. (delivering the judgment of the Court): On August 26, 1971 Chin Thian Guan, the registered proprietor, executed a memorandum of transfer of Lot 458 Mukim Tampin Tengah held under EMR 412 in favour of Tan Tock Sing for a stated consideration of dollars thirty thousand only ($30,000.00) and this transfer was duly registered at Tampin Land Registry Office on October 29, 1971. Subsequently, Tan Tock Sing subdivided Lot 458 into eight shoplots now known as HS(M) No. 1-80 for PT No. 1081 to HS(M) N. 8-80 for PT No. 1088, Mukim Tampin Tengah and charged all the eight shoplots to Tong Bee Finance (Malaysia) Berhad to secure a loan, on or about November 2, 1979. And on December 23, 1981 Tan Tock Sing entered into a Sale and Purchase Agreement in writing with Yong Wee Ming who agreed to buy all the eight shoplots free from all encumbrances and with vacant possession for the sum of dollars three hundred and twenty thousand only ($320,000.00). Before the registration of (a) the memorandum of discharge of charge executed by Tong Bee Finance (Malaysia) Berhad and (b) the memorandum of transfer of the eight shoplots signed by Tan Tock Sing, Chin Thian Guan lodged a caveat against all the eight shoplots and the caveat was entered on the register on April 8, 1982 as private caveat No. 26/82. In the statutory declaration verifying the nature of the claim Chin Thian Guan stated that "I am the owner of the said lands referred to above which were held in trust for me by Tan Tock Sing". Yong Wee Ming, a person aggrieved by the existence of the caveat, applied under section 327(1) of the National Land Code 1965 to the High Court at Seremban for the removal of the said caveat but the application was dismissed with costs. This is an appeal by Yong Wee Ming (hereinafter referred to as the appellant) against the decision of the learned judge. The respondent in this appeal is Chin Thian Guan, the caveator.

Lord Wright in *Abigail* v. *Lapin*[1] said:–

"No notice of trusts may be entered in the register book, but it has long been held that equitable claims and interests in land are recognized under the Real Property Acts. This was held by *Barry* vs. *Heider* (1914) 19 CLR 197 and in *Great West Permanent Loan Co.* v. *Friesen* [1925] A.C. 208; for the protection of such equitable interests or estates, the Act provides that a caveat may be lodged with the registrar by any person claiming as *cestui que trust*, or under any unregistered instrument or any other estate or interest; the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat. Thus, though the legal interest is in general determined by the registered transfer, and is in law subject only to registered mortgages or other charges, the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to

enable the equitable claimant to protect his claim by enabling him to bring an action if his claim be disputed ....."

In the case of *Assets Co. Ltd.* v. *Mere Roihi*[2] Lord Lindley said:–

"Then it is contended that a registered owner may hold as trustee and be compelled to execute the trusts subject to which he holds. This is true; for, although trusts are kept off the register, a registered owner may not be beneficially entitled to the lands registered in his name. But if the alleged *cestui que* trust is a rival claimant, who can prove no trust apart from his own alleged ownership, it is plain that to treat him as a *cestui que* trust is to destroy all benefit from registration. Here, the plaintiffs set up an adverse title and nothing else; and to hold in their favour that there is any resulting or other trust entitling them to the property is, in their Lordships' opinion, to do the very thing which registration is designed to prevent. Their Lordships cannot give effect to the ingenious arguments addressed to them on this point; nor can they adopt the case of *Solicitor-General* v. *Mere Tini* 17 NZLR 773 as an authority which ought to be followed in these appeals."

In other words, the principle of indefeasibility of title conferred by registration under the Torrens System cannot be defeated by setting up the fiction of a trust or by applying the principles of what has been called constructive or equitable notice. However, in our opinion, the dictum of Lord Lindley can be distinguished from the present appeal in that quite apart from his own assertion of ownership the respondent also produced a letter allegedly written by Tan Tock Sing on March 3, 1979 declaring the alleged trust. To use the words of Lord Diplock in *Eng Mee Yong & Ors.* v. *Letchumanan*[3] the learned judge was justified in holding that the claim of the respondent against Tan Tock Sing, the registered proprietor, is not baseless, frivolous or vexatious; in other words the affidavit evidence before the courts discloses that there is a serious question to be tried. Before dismissing the application the learned judge ordered the respondent to file a suit against Tan Tock Sing within one month from date thereof and on the balance of convenience, the learned judge was satisfied that in order to maintain the *status quo* the said caveat should remain until the trial of this action. We see no reason to differ from the conclusion reached by the learned judge. For the above reasons we dismiss the appeal with costs and order the deposit to be paid to the respondent to account of taxed costs.

Appeal dismissed.

Solicitor: *Azam-Malek & Soh; Humfrey Ball.*

MAT SHAH BIN MOHAMED & ANOR. v. FOO SAY MENG & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Mohamed Azmi F.JJ.) February 2 to 4, March 15 & August 20, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 178 of 1982]

Practice & Procedure – Appeal – Questions of fact – Appellate court will not interfere with finding of trial court based on assessment of evidence of witnesses.

Partnership – Death of partner – Whether property rights in licence belong to firm or individual – Partnership Act, 1961, ss. 24 & 35.

Practice & Procedure – Parties – Locus standi – Failure to sue estate of deceased person.

In this case the State Government of Kelantan had issued two timber concessions to a firm known as Syarikat Perusahaan Kayu Kayan Kelantan. There were two Syarikats of the same name, one in Kota Bahru and the other in Kuala Krai. The appellants claimed that the first appellant was the sole proprietor of the Syarikat and was the owner and holder of the two forest licences. They alleged that Foo Chow Juan (deceased) was once a logging contractor of the appellants and then subsequently the deceased unlawfully refused to return the licences to the appellants. He subsequently falsely represented to the State Forest officer that the two licences belonged to him and the State Forest officer accepted the deceased as the owner and holder of the licences. The respondents on the other hand claimed that the licences were lawfully issued to the deceased, Foo Chow Juan, who was a logger and sawmiller and that they and the deceased were partners. They claimed that on the death of the deceased, the partnership was not dissolved. After hearing the evidence, the learned trial judge believed and accepted the evidence adduced by the respondents. He held that the appellants had not discharged the burden of proof and therefore he was not satisfied that the appellants had established their claim as the rightful owner of the two licences. He dismissed the claim of the appellants. The appellants appealed.

Held, the learned judge in this case had the advantage of seeing and hearing the witnesses which opportunity the appellate court did not enjoy and there was no reason in this case for the appellate court to interfere in the case.

Cases referred to:

(1) *Chai Sau Yin* v. *Liew Kwee Sam* [1962] M.L.J. 152, 153.
(2) *Wray* v. *Wray* [1905] 2 Ch. 349.
(3) *Robinson* v. *Ashton* (1875) L.R. 20 Eq. 25.
(4) *Ashworth* v. *Munn* (1880) 15 Ch. D. 363, 369.
(5) *Brook* v. *Badley* L.R. 3 Ch. App. 672.
(6) *Attree* v. *Hawe* (1878) 9 Ch. D. 337.
(7) *In re Wilson, Wilson* v. *Holloway* [1893] 2 Ch. 340, 343.
(8) *Waterer* v. *Waterer* (1872-3) L.R. 15 Eq. 402, 406.
(9) *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.* [1971] 2 M.L.J. 161.